11431

No. ~~11,461~~

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SUE HOO CHEE,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

REPLY BRIEF FOR APPELLANT.

WALTER E. HETTMAN,
CHAN CHUNG WING,
300 Montgomery Street, San Francisco 4,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 11,461

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SUE HOO CHEE,	*Appellant,*
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UNITED STATES OF AMERICA,	*Appellee.*

REPLY BRIEF FOR APPELLANT.

By the time this brief is reached it will be evident to the court that the insinuations that appellant's white wife was a narcotic user first came into the record at the instance of the United States Attorney during his cross-examination of appellant. The court eventually curbed the insinuating line of interrogation by ruling that it was improper cross-examination. But in resisting that ruling the United States Attorney found occasion to state in the presence of the jury that he had evidence in his possession that appellant's wife was a narcotic user and that appellant had knowledge of her use.

The result of these improper insinuations was to force appellant's counsel to one or the other of two

alternatives when he called appellant's wife to the stand as a witness for appellant. She appeared before the jury as one branded by a United States Attorney as a narcotic user upon proof asserted to be in his possession. If she was not interrogated on direct examination respecting the insinuations, the jury would naturally assume that she could not deny them. If she was interrogated on direct examination respecting the insinuations, the United States Attorney would naturally attempt to pursue a line of further insinuations on cross-examination. What the United States Attorney fails to recognize in the brief for appellee is that it was because of his improper conduct that appellant's counsel was forced to these alternatives.

The course taken by appellant's counsel was to interrogate the witness on the subject during her direct examination. On direct examination she emphatically denied that she was a narcotic user. On cross-examination she emphatically repeated those denials. The false issue thus created was a collateral one, and under the authorites cited in appellant's previous brief was not subject to rebuttal testimony. Contrary to the rule of such cases, however, the United States Attorney persisted in his improper insinuations by offering rebuttal testimony until he was eventually and belatedly curbed by adverse rulings of the court.

That appellant was denied a fair trial would seem obvious. By the insinuations just discussed it was conveyed to the jury that his white wife was a narcotic user with his consent and approval and that the

United States Attorney had evidence in his possession to prove the truth thereof. By other insinuations discussed in appellant's previous brief it was conveyed to the jury that appellant conducted a gambling house. No case of a person of the Chinese race charged with illicitly trafficking in narcotics could possibly survive in surroundings of improper insinuations so damaging and prejudicial.

The language of the Supreme Court of the State of California in *People v. Glass,* 158 Cal. 650, is particularly apt.

Quoting from pages 654, 655, 656, 657, and 658:

(654) "It should seem unnecessary to state—but apparently" (655) "it is not—that a multitude of acts, facts, and happenings upon which men base their opinions and judgments of their fellow-men do not come within the definition and scope of *evidence* as known to our law. If a man is informed, and believes his informant, that another man is dissolute, is a gambler, is an associate of known thieves, is a petty larcenist, and makes his home in a house of prostitution, he will justly look upon such a person with suspicion, will properly govern his dealings and relations with that person by this information, and would most naturally say, if he learned that the man had been arrested for burglary, that 'it was to be expected.' Yet, upon the trial of that man for burglary, no word of these matters would be admissible against him. Not because they would not have a tendency to show that a man of such character would be much more likely to commit the given offense than would a man of proven upright and honorable life, but because the law, for reasons

good and sufficient unto itself, has declared that a man shall be put upon trial for but one offense, and that he shall not be embarrassed by being called upon to defend or exculpate himself, or to explain any damaging act or fact which is not embraced within the charge he is called upon to meet. The law will not even permit a defendant's reputation to be assailed unless he shall himself have made that reputation an issue in the case. This, perhaps, undue tenderness goes to the extent that his guilt of petty offenses may not even be shown, and in his impeachment it may be established against him only that he has been previously convicted of a felony. It would, no doubt, have made most potently against this defendant in the minds of the jurors, if, for example, it could have been shown that in this separate and distinct Oakland transaction he had bribed the councilmen there. But no one has been bold enough to assert that such evidence would be admissible, and the decisions of every court, including our own, are against its admissibility. Not only is the prosecution thus forbidden to prove another crime, but the law does not sanction the introduction of evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury."

(656) "The real reason why the evidence was offered is most obvious. It was not offered to show motive. It was not offered to show identity and plan or identity of plan. These are the veriest pretenses. It was designed to besmirch and degrade the defendant and to be made use of in argument, to show that the defendant had gone the length of organizing" (657) "a fraudulent corporation. * * *

That this evidence was potent for the purpose of degrading the defendant in the eyes of the jurors will at once be conceded. That it had a tendency to inflame the mind of the jurors against the defendant by showing that in the past he had resorted to the arts of treachery and fraud to prevent honest competition, is quite apparent. That men in the every day affairs of life would have been influenced by'' (658) ''such evidence is unquestionably true. But these things go to establish merely the wrong which its admission worked upon the defendant, and not its admissibility. It was not admissible. Clearly, in the everyday affairs of life, if it should be established to the satisfaction of the jury that upon another and distinct occasion a defendant had offered or solicited a bribe, it would have great weight with them in determining whether in the instance charged he had been guilty of the offense. It would establish, at least, that he was the sort of man who would be willing to do this criminal act. Such was the line of reason and argument here employed. Yet such matters are never legal evidence. In discussing precisely such a case, where evidence had been admitted against the defendant charged with bribery, of a former act of like character, the court of appeals of New York says: 'The mental ability and disposition of the defendant to commit a crime of this sort, while it might persuade a jury, raises no legal presumption. * * * Yet the inference drawn by the prosecuting officer, and permitted by the court, left it to the jury to say that the desire of Sharp, manifested by the offer of a bribe in one instance, was the same desire which led to the actual giving of the bribe in the other; hence that

Was this page misplaced in binding? Looks as if it were.

No. 11585

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK HYNES, Regional Director, Fish and Wildlife Service, Department of Interior,

Appellant,

vs.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY, LIBBY, McNEILL AND LIBBY, FRANK McCONAGHY & CO., INC., PARKS CANNING CO., INC., SAN JUAN FISHING & PACKING CO., and UGANIK FISHERIES, INC.,

Appellees.

Transcript of Record

In Two Volumes
Volume I
Pages 1 to 288

Upon Appeal from the District Court for the Territory of Alaska, Fourth Division

Rotary Colorprint, 870 Brannan Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES:

For Taxpayer:

HENRY J. RICHARDSON, Esq.,
WALTER C. FOX, JR., Esq.

For Commissioner:

LLOYD C. HOOKS, Esq.

Transferred to Judge Harlan. 7/22/36.

Docket No. 453 P. T.

CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1945

Aug. 10—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 10—Copy of petition served on General Counsel.

Aug. 10—Request for hearing at San Francisco, filed by taxpayer. 8/20/45 Granted.

Sep. 21—Motion for extension to 11/8/45 to move or to file answer, filed by General Counsel. 9/21/45 Granted.

Nov. 7—Motion to dismiss appeal filed by General Counsel.

1945

Nov. 9—Hearing set 11/28/45 on respondent's motion.

Nov. 28—Hearing had before Judge Turner on motion of respondent to dismiss. Consolidated with Docket 452 P. T. Held C.A.V. Respondent's brief due 90-days. Petitioner's reply brief 30-days. Respondent's reply brief 20-days.

Dec. 3—Transcript of hearing 11/28/45 filed.

1946

Feb. 26—Brief re motion to dismiss filed by General Counsel. Served 2/27/46. Copies Received 5/8/46.

Mar. 28—Reply brief re motion to dismiss filed by taxpayer. Served 3/29/46.

Apr. 17—Reply to petitioner's brief filed by General Counsel. Served 4/18/46. Copies received 5/8/46.

Jul. 31—Memorandum opinion rendered, Judge Harlan. Motion to dismiss proceeding will be sustained. Copy served 8/1/46.

Aug. 6—Decision entered. Judge Harlan. Div. 11.

Aug. 22—Motion for review by the Court, memorandum in support attached, filed by petitioner. 8/23/46 Denied.

Aug. 27—Motion for reconsideration filed by taxpayer. 8/28/46 Denied.

Oct. 23—Petition for review by U. S. Circuit Court of Appeals and statement of points filed by taxpayer.

1946

Oct. 23—Proof of service filed by taxpayer.
Oct. 23—Praecipe with proof of service thereon filed by taxpayer. [1*]

The Tax Court of the United States

Docket No. 453 P. T.

CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

Comes now California and Hawaiian Sugar Refining Corporation, Ltd., claimant, and files its petition with The Tax Court of the United States, requesting a hearing on the merits of its claim filed under Title VII of the Revenue Act of 1936 for the refund of processing tax paid under the Agricultural Adjustment Act, as amended, which was disallowed in whole by the Commissioner of Internal Revenue by letter dated May 19, 1945, bearing symbols IT:P:CA:DHS, and as a basis of this proceeding alleges as follows:

I.

Petitioner is a corporation organized and existing under and by virtue of the laws of the State

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* Page numbering appearing at top of page of original certified Transcript of Record.

of California, with its principal address at 215 Market Street, San Francisco, California. Petitioner filed its processing tax returns with and paid the tax thereon to the United States Collector of Internal Revenue at San Francisco, California, for the period of the tax herein involved. [2]

II.

Petitioner filed its claim under Title VII of the Revenue Act of 1936 as amended for refund of the tax paid under the Agricultural Adjustment Act as amended, with respect to the processing of jute fabric on P.T. Form 79, Treasury Department, Internal Revenue Service, for the amount of $4,818.00 with the Collector of Internal Revenue at San Francisco, California, on December 27, 1939. A copy of said claim as amended is attached hereto and made a part hereof as Exhibit A. On December 16, 1942, within three years after the said claim was filed, the period within which the Commissioner was required to allow or disallow said claim was extended with the written consent of the claimant to June 30, 1943; on May 14, 1943, said period was extended to June 30, 1944, and on May 24, 1944 said period was so extended to June 30, 1945.

III.

The notice of disallowance of petitioner's claim for refund (a copy of which is attached hereto as Exhibit "B") was mailed to petitioner by respondent by registered mail on May 19, 1945.

IV.

The respondent's disallowance of petitioner's claim for refund in whole is based upon the following errors:

(1) Repsondent erred in holding that

> "An examination of the evidence submitted in connection with and in support of your claim discloses that you have not established that you bore the burden of the tax, refund of which is claimed. [3] Accordingly, your claim is hereby disallowed in the full amount." (Notice of Disallowance.)

(2) Respondent erred in failing to hold that petitioner had estabilshed in accordance with the statute and regulations that petitioner bore the burden of all of the tax according to the evidence and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, and that no understanding or agreement exists whereby petitioner may be relieved of the burden, reimbursed therefor, or may shift such burden.

(3) Respondent erred by, in effect, adopting as rebuttal of petitioner's evidence that it bore the burden of the entire tax the position that because of its manner of operating as a Cooperative petitioner could not as a matter of law bear any part of the burden of the tax or of any other expense of operation.

(4) In so holding respondent erred in construing Title VII of the Revenue Act of 1936 in a manner

to constitute a denial of due process of law in contravention of Section 1 of the 5th Amendment to the Constitution of the United States.

(5) In so holding and construing said Title VII as applied to petitioner's organization and method of doing business, but allowing the claims of other processors who bore the burden of the tax in the same manner, respondent has erred by discriminating against petitioner contrary to law.

(6) In so holding respondent has erred in ignoring the mandate of the law that producer owned and controlled cooperative marketing associations shall be recognized and encouraged [4] rather than penalized because of their method of operations.

V.

The facts upon which petitioner relies as the basis of this proceeding are as follows:

(1) Petitioner's principal business is that of refining and selling sugar, maintaining a complete line of sugar products of all grades and types of packages. As an incident to said principal business petitioner manufactures some of the containers in which said sugar products are sold, including bags made of jute fabric. As such manufacturer of jute bags petitioner was a first domestic processor of the jute fabric so used.

(2) In November 1933 the Secretary of Agriculture ordered that the processing tax then being imposed under the Agriculture Adjustment Act on cotton should apply to the first domestic processing

of jute as compensating tax on a kindred commodity effective on all processing after December 1, 1933.

(3) During the period of the tax, to-wit, through the months of December 1933 to and including November 1935, petitioner processed or used in making jute bags 215,867 pounds of jute fabric and paid the processing tax thereon in the amount of $4,953.95 with interest of $30.68. Of this amount petitioner received in May 1935 a refund of the tax amounting to $166.63, leaving a balance unrefunded of $4,818.00, the amount of the [5] claim here involved.

(4) The Agricultural Adjustment Act was held to be unconstitutional, and the taxes collected thereunder illegally collected, by the United State Supreme court in U. S. v. Butler, et al. (297 U. S. 1) on January 6, 1936.

(5) Congress enacted Title VII of the Revenue Act of 1936, approved June 22, 1936, prohibiting the refund of any tax, paid as processing tax, to the processor from whom it had been so illegally collected except in accordanc with provisions of said Title.

(6) Petitioner complied with the provisions of said Title VII and timely filed its claim for refund of the tax paid by it as aforesaid on the ground that it did not sell any articles processed from the commodity and never changed the price of its product for which the jute bags were used as containers to take into account the processing tax on the processing of said jute, and submitted with said claim evidence to prove said grounds.

(7) No part of the processing tax with respect to which the aforesaid claim was filed, has at any time been refunded to petitioner.

(8) Petitioner bore the burden of the amount of the tax paid by it as processor to the extent of $4,818.00 and has not been relieved thereof nor reimbursed therefor, nor shifted such burden directly or indirectly through the inclusion of such amount in the price of sugar sold; through reduction of the price paid for the commodity processed; or in any other manner whatsoever; and no understanding or agreement exists whereby petitioner may be relieved of the burden of such amount, be reimbursed therefor, or [6] may shift the burden thereof.

(9) Petitioner is a corporation created under the General Corporation Laws of the State of California.

(10) Throughout the periods here involved petitioned was organized and operated on a cooperative basis, marketing the product of its members, who were also its stockholders in approximately the same relative proportions as they produced the product for marketing, and turning back to them according to the quantity and quality of such products furnished by them gross proceeds of sales of the product furnished and all other income less necessary marketing expenses, a nominal fixed dividend on its capital stock and reasonable reserves for necessary purposes.

(11) Under the contract forming the cooperative

basis petitioner purchased the raw sugar produced by its stockholders, who thus became its cooperative members, at a unit price determined on a yearly basis by adding the gross proceeds from the sale of such sugar, the gross proceeds from the sale of sugar purchased from others and all other income of petitioner for such year, subtracting therefrom the purchase price of sugar purchased from others all manufacturing, marketing, operating and other expense of petitioner for the year involved, including reasonable reserves for necessary purposes, and an amount equal to 6% of petitioner's capital with which to pay a nominal fixed dividend on its capital stock, and dividing the remainder by total units purchased from its member-stockholders during such year.

(12) Under said contract petitioner paid this purchase price by remitting to its member for their respective sugar [7] as an initial payment 75% of an agreed average market basis within a certain number of days after delivery or shipment, plus or minus polarization premium or penalty for sugar testing above or below 96° raw value for the sugar purchased from them, and after the end of a given year's operations and the determination of the unit purchase price as aforesaid for said year, adding there to polarization penalties deducted and subtracting polarization premiums added in the initial payments, and deducting the initial payment previously made (exclusive of polarization premiums or

penalties) to a member, paid said member the balance of the unit price so determined.

(13) Petitioner in marketing the product supplied by its member-stockholders under the contract aforesaid processed some of the products and sold the remainer of the product supplied by them to other refiners in its raw state or without processing.

(14) During petitioner's fiscal year ended November 30, 1934, its member-stockholders supplied it with 824,413 tons of sugar 96° raw value, of which petitioner received for refining or processing 495,535 tons and sold the remainder of 328,878 tons in its raw state or without processing to other refiners, and during its fiscal year ended November 30, 1935, its member-stockholders supplied it with 838,957 tons of sugar 96° raw value, of which petitioner received for refining or processing 536,610 tons and sold the remainder of 302,347 tons in its raw state or without processing to other refiners. Petitioner also purchased and processed 9,582 tons of sugar 96° raw value from non-members during its fiscal year 1934 and 9,060 tons during its fiscal [8] year 1935. Of 489,725 tons 96° raw value refined or processed by petitioner during its fiscal year ended November 30, 1934, 236,926 tons were so refined or processed during the period of tax, and the processing tax paid thereon by petitioner, and the remainder of 252,799 tons was refined by petitioner before the period of the tax. Of 583,236 tons refined or processed by petitioner during its fiscal year ended November 30, 1935, 547,628 tons were so

refined or processed during the period of the tax, and the processing tax paid thereon by petitioner, and the remainder of 35,608 tons was refined by petitioner after the period of the tax.

(15) Under petitioner's cooperative method of operating, with its member-stockholders pursuant to the contract aforesaid, the entire avails or net results of petitioner's entire operations, determined in the manner aforesaid, whether from the sale of their product or not, were returned to said member-stockholders as members of a Cooperative, according to the quantity and quality of the product supplied by each such member in proportion to the total quantity and quality of such product supplied by all such members during each of the fiscal years ended November 30, 1934 and 1935. Thus each such member received from petitioner from the avails of its operations during its fiscal years ended November 30, 1934 and 1935, the exact same amount per unit of product supplied by it to petitioner as did each other member during the same year, adjusted only for polarization premiums and penalties. Thus each member received from petitioner the same amount per unit [9] of product supplied by it regardless of whether the product supplied by it was refined or processed by petitioner or sold in its raw state to other refiners, or whether said product was processed by petitioner during the period of the tax or outside of such period. Thus the economic effects of the tax or other expense or of any income of petitioner were felt, not by the producers of the

sugar processed during the tax period, but by all the cooperative members of petitioner without distinction as between those who supplied raw sugar which was processed and those who supplied sugar which sold raw without processing, and without distinction as between those whose raw sugar was processed during the tax period and those whose sugar was processed outside the tax period. In this same manner the common stockholders of any other corporation or the members of any partnership would have felt such economic effects.

(16) Petitioner purchased the jute fabric, with respect to the processing of which the tax here involved was imposed and paid, in the open market at current prices from persons unknown to petitioner.

(17) Petitioner did not sell any of the jute bags constituting the article processed from the commodity, and therefore has no gross sales value of such articles, or such gross sales value was zero, for purposes of computing any margin evidence according to the statute. [10]

(18) Petitioner never at any time changed the differential in price between packages of its product sold in jute bags and that sold in other types of containers with respect to the manufacturing of which no tax was imposed, on account of the processing tax on jute.

Wherefore, petitioner prays that this Court will grant a hearing on the merits of its claim and find

that it bore the burden of the tax according to the evidence in the amount of $4,818.00, and order a refund thereof with interest as provided by law.

/s/ HENRY J. RICHARDSON,
Transportation Building,
Washington 6, D. C.

/s/ WALTER C. FOX, JR.,
111 Sutter Street,
San Francisco 4, California.

VERIFICATION

State of California,
City and County of San Francisco—ss.

C. E. Schink, being duly sworn, says that he is Treasurer of the petitioner, California and Hawaiian Sugar Refining Corporation, Ltd., and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the facts stated are true, except as to those stated to be upon information and belief, and those facts he believes to be true.

C. E. SCHINK.

Subscribed and sworn to before me this 1st day of August, 1945.

[Seal] ELLA COOK KELLY,

Notary Public, in and for the City of San Francisco, State of California.

My Commission expires Dec. 23, 1948.

Filed Aug. 10, 1945. [12]

P. T. Form 79
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

READ AND FOLLOW INSTRUCTIONS CAREFULLY

This claim must be filed before June 30, 1937, with collector of the district. Not allowable if presented after said date; nor for an amount less than $10.

DATE RECEIVED BY COLLECTOR (STAMP BELOW)

CLAIM FOR REFUND

(Under Title VII, Revenue Act of 1936)

OF

PROCESSING TAX[1]

PAID UNDER THE PROVISIONS OF

THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

Exhibit "A"

Name of claimant California and Hawaiian Sugar Refining Corporation, Ltd.

(Type or print name and address)

Address 215 Market Street
(Name and number of street)

San Francisco, California
(City or town) (State)

(1) Name commodity[2] processed (one only, make separate claim with respect to each other commodity)	(2) Amount of burden of processing tax borne by claimant and not shifted to other persons (Set out in Schedule B) Dollars	Cents	(3) Amount of processing tax passed on but unconditionally repaid to vendees (Itemized in Schedule E) Dollars	Cents	(4) Amount of refund claimed (Sum of columns 2 and 3) Dollars	Cents	(5) For use of Bureau
Raw Refined	4,215.	00			4,215.	00	

I swear (or affirm) with respect to this claim and the schedules and other evidence submitted as a part thereof:

1. That the amount and date of each payment of processing tax on the processing of the commodity named above as shown in Schedule A are true and correct;
2. That the amounts of processing tax on the processing of the commodity named above, heretofore refunded or credited to claimant as shown in Schedule B, are the total amounts of such refunds and credits;
3. That the amounts of processing tax on the processing of the commodity named above, heretofore refunded or credited to other persons as shown in Schedule C, are the total amounts of such refunds and credits of which claimant has any knowledge;
4. (*a*) That the amount of the burden of the processing tax on the processing of the commodity named above which was borne by the claimant as set forth in column 2 above is true and correct; that the claimant has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article processed from such commodity; (2) through reduction of the price paid for such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; and (*b*) that the data and statements submitted in and made a part of Schedule D are true and correct;
5. That the amounts of processing tax shown in column 3 and Schedule E as having been passed on and repaid were unconditionally repaid to vendees, each of whom has furnished evidence which is attached showing that he has borne the burden thereof, has not been relieved thereof, nor reimbursed therefor, and has not shifted such burden, directly or indirectly, and is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever;
6. That no other claim has been filed by claimant on P. T. Form 79 for refund of any part of the amount of this claim;
7. That the claimant is entitled to and demands payment of this claim in the amount shown above.

California and Hawaiian Sugar Refining Corporation, Ltd.
(Name of claimant)

Subscribed and sworn to before me this ..... day of ....., 193...

[NOTARIAL SEAL]

(Signature of person executing affidavit)

(Signature of officer administering oath) (Title)

(State whether individual owner, member of firm, or if officer of corporation or duly authorized manager or agent, give title)

Section 35, United States Criminal Code, as amended, provides a fine of $10,000 or 10 years imprisonment, or both, for the filing of a false claim, for making of a false statement in an affidavit, or for falsifying, concealing, or covering up by any trick, scheme, or device, a material fact in connection with a claim.

Claimed, $..... Examined by .....

Allowed, $..... Approved .....
(Head of division)

Rejected, $..... ....., 19.....

[1] The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee. Any claim for refund of amounts paid as tax on the processing of that quantity of a commodity which was processed for a customer for a charge or fee shall be filed on P. T. Form 78.

[2] See par. 3 of instructions.

9—17200

SCHEDULE A. PROCESSING TAX PAYMENTS BY CLAIMANT TO COLLECTOR OF INTERNAL REVENUE

FOR COLLECTOR'S USE CERTIFICATE

Item No	Month and year for which tax was paid	Amount of processing tax included in total paid each month (do not include any "floor-tax processing" tax)	Amount of each payment[1] as tax on total processing of commodities for the month	Penalty	Interest	Date of each payment	District in which paid	Collector Paid: Amount	Collector Paid: Date	Abstract: List	Abstract: Page	Abstract: Item
	1934											
1	Dec.	$ 283.68	$ 281.20	$ -	$ -	1/26/34	S.F.	$				
			2.45		.10	10/30/34	"					
	(1934)						"					
2	Jan.	238.38			.14	2/21/34	"					
						10/30/34	"					
3	Feb.	295.88	291.63			3/20/34	"					
			3.62		.15	10/30/34	"					
4	Mar.	261.00	257.00			4/10/34	"					
			3.80		.21	10/30/34	"					
5	Apr.	120.30	120.00			5/24/34	"					
			.30		.06	10/30/34	"					
6	May	65.35	64.73			6/13/34	"					
			.62		.06	10/30/34	"					
7	June	295.90	225.07			7/20/34	"					
			70.83			4/22/35	"					
8	July	18. 40	18.40			4/22/35	"					
9	Aug.	109.85	109.85			4/22/35	"					
10	Sept.	208.38	208.38			4/22/35	"					
11	Oct.	82.71	82.71			4/22/35	"					
12	Nov.	141.05	141.05			4/22/35	"					
13	July-Nov. 1934 Inclusive				89.05	8/19/35	"					
14	Dec.	248.78					"					
	(1935)						"					
15	Jan.	236.07	140.07			2/13/35	"					
			96.00			4/22/35	"					
16	Feb.	201.88	48.00			3/15/35	"					
			153.88			4/22/35	"					
17	Mar.	70.88	70.88			4/22/35	"					
18	Apr.	316.84	316.84			5/29/35	"					
19	May	357.55	357.55			6/26/35	"					
20	June	232.55	232.55			7/29/35	"					
21	July	186.55	186.55			8/26/35	"					
22	Aug.	147.55	147.55			9/26/35	"					
23	Sept.	338.89	338.89			10/24/35	"					
24	Oct.	275.10	275.10			11/25/35	"					
25	Nov.	180.05	180.05			12/26/35	"					
		4,965.95	4,965.95		30.85							

[1] See par. 9 (b) of instructions.

[2] Enter each of several payments for the same month on successive lines; and show the total of all such payments for a single month immediately below the entry of the amount of the last of such payments

2—17310

SCHEDULE B.—PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, CLAIMANT

(Enter item numbers in same order as shown in Schedule A; make all entries relating to a particular item on consecutive lines; state separately amount of each credit and of each refund claim allowed)

PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, CLAIMANT

Show payment against which refund or credit was made, by item number in Schedule A	Credits				Refunds		Total refunds and credits	For use of Bureau
	Taken on P T returns			Amount	Date received	Amount		
	Form No.	Month	Year					
4	8	May	1935	$ 38.80		$	$	
5	8	May	1935	44.39				
6	8	May	1935	17.79				
7	8	May	1935	84.25				
				184.63				

SCHEDULE C.—PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, PERSONS OTHER THAN CLAIMANT

(Enter item numbers in same order as shown in Schedule A; make all entries relating to a particular item on consecutive lines; state separately amount of each credit and of each refund claim allowed)

PROCESSING TAX REFUNDED TO, OR FOR WHICH CREDIT HAS BEEN TAKEN BY, PERSONS OTHER THAN CLAIMANT

Show payment against which refund or credit was made, by item number in Schedule A	Name and address of each person to whom tax was refunded, or by whom credit was taken	Credits				Refunds		For use of Bureau
		Taken on P T returns			Amount	Date received	Amount	
		Form No.	Month	Year				
	None				$		$	

SCHEDULE D.—BURDEN OF PROCESSING TAX PAID BORNE BY CLAIMANT AND NOT SHIFTED TO OTHER PERSONS

D-1. PRIMA FACIE SHOWING WITH RESPECT TO TAX BURDEN

(a) AVERAGE MARGIN FOR THE TAX PERIOD

(Claimant must show as to each month of the tax period the data required in columns 2 to 7, inclusive. Such data shall be shown only with respect to that quantity of the commodity as to which the claimant paid processing tax to the collector of internal revenue. See also pars. 7 (b) (1) and 9 (e) also 7 (b) (4) of instructions on this form.)

(1) Month (or portion thereof stated) and year	(2) Gross sales value of all articles processed from the commodity	(3) Cost of the commodity processed during month	(4) Amount of tax paid on processing of such commodity	(5) Total of columns 3 and 4	(6) Margin (Amount in column 2 less amount in column 5)	(7) Total number of units of the commodity² processed during month	(8) For use of Bureau
193 .							
	$	$	$	$	$		
Totals							

The average margin[1] for the tax period per ______ (Unit of the commodity)[2] was $

[1] The average margin for the tax period shall be ascertained by dividing the total of the margins for the period (total of column 6) by the total number of units of the commodity processed during the period (total of column 7).
[2] The term "unit of commodity" is defined in par. 9 (f) of instructions.

2—17239

SCHED. 2 D.—BURDEN OF PROCESSING TAX PAID BORNE BY CLAIMANT AND NOT SHIFTED TO OTHER PERSONS—Con.

D-1. PRIMA FACIE SHOWING WITH RESPECT TO TAX BURDEN—Continued

(b) AVERAGE MARGIN FOR THE PERIOD BEFORE AND AFTER THE TAX

(Claimant must show as to each month of the period before and after the tax the data required in columns 2 to 5, inclusive. See also pars. 7 (b) (2) and 9 (e) also 7 (b) (4) of instructions on this form)

(1) Month (Or portion thereof, state parties) and year	(2) Gross sales value of all articles processed from commodity	(3) Cost of commodity processed during month	(4) Margin (Amount in column 2 less amount in column 3)	(5) Total number of units of the commodity processed during month	(6) For use of Bureau
193..					
	$	$	$		
1935 February					
March					
April					
May					
June					
July					
TOTALS					

The average margin [1] for the period before and after the tax per _____ was $_____
(Unit of commodity) [2]

[1] The average margin for the period before and after the tax shall be ascertained by dividing the total of the margins for the period (total of column 4) by the total number of units of the commodity processed during the period (total of column 5).

[2] The term "unit of commodity" is defined in par. 9 (f) of instructions.

9—17200

SCHEDULE D.—BURDEN OF PROCESSING TAX PAID BORNE BY CLAIMANT AND NOT SHIFTED TO OTHER PERSONS—Con.

D–1. PRIMA FACIE SHOWING WITH RESPECT TO TAX BURDEN—Continued

(c) CALCULATION OF AMOUNT AS INDICATED BY THE EVIDENCE AS TO MARGINS

(1) Average margin per unit of commodity processed for the period before and after the tax (As shown by Schedule D–1–(b))	(2) Average margin per unit of commodity processed for the tax period (As shown by Schedule D–1–(c))	(3) Amount by which average margin for the period before and after the tax exceeds the average margin for the tax period (Column 1 minus column 2)	(4) Total number of units of commodity processed during tax period with respect to which processing tax was paid (As shown by Schedule D–1–(a))	(5) Amount of tax burden borne by claimant and not shifted as indicated by margin evidence (Column 3 multiplied by column 4)
$ None per ..... (Unit of commodity)	$ None per ..... (Unit of commodity)	$ ..... per ..... (Unit of commodity)	..... (Unit of commodity)	$ .....

(Claimant must complete either A or B below and strike out the one not applicable)

A. The amount shown in column 5 above, namely, $....., is the correct amount of the processing tax paid by claimant and not shifted to others. (If claimant agrees that this figure is correct any additional facts and evidence in support thereof should be set out and made a part of Schedule D–2.)

B. The amount shown in column 5 above is not the correct amount of the processing tax paid by claimant and not shifted to others. The correct amount is $ 4,818.00, for the reasons and upon the evidence set out and made a part of Schedule D–2.

D–2. OTHER EVIDENCE

(Claimant shall list below each document, exhibit, statement of facts, and other evidence submitted with and made a part of this schedule in support of the showing as to margins, or in rebuttal thereof and tending to establish that he bore the burden of the tax. See also pars. 7 (a) and 7 (c) of instructions.)

SCHEDULE 1 - Statement of Amount of Tax Borne by Claimant.

Price

SCHEDULE 1a - Statement of Package Differentials for Period October 24, 1933 to February 5, 1934.

SCHEDULE 1

Jute Fabric

Amount of Processing Tax Paid on Jute Fabric (Schedule A)	$4,953.95
Amount of Interest Paid on Above Taxes	30.68
Total Payments (Schedule A)	$4,984.63
Amount of Credits Taken by Claimant (Schedule B)	166.63
Balance of Payments	$4,818.00
Amount of Tax Shifted to Vendees or Other Persons by Increases in Selling Prices of Sugar Products	None
Burden of Processing Tax Borne by Claimant	$4,818.00

Supporting Statement

The business of this claimant is the manufacture and sale of sugar products. The claimant is not in the business of selling jute fabric or articles manufactured therefrom. All articles made from jute fabric upon which processing tax payments were made by claimant were used as containers for the packing of sugar.

Schedule A shows the amount of tax upon the monthly production of articles made from jute fabric. On June 11, 1934, the tax was suspended on small jute bags. As a result, refund or credit of some processing tax was obtained on articles in

inventory as of that date. These articles are eliminated from this claim. The cost of jute fabric used for container material is one of claimant's costs for preparing sugar products for sale. The tax imposed upon jute articles likewise became an additional cost of this claimant. Since claimant is not merchandising jute fabric, there is no sales value and no margin of sales value over cost. These costs could have shifted only to purchasers of the sugar products. Claimant did not pass on the burden of the tax by any increase in the package differential or in the price of refined sugar or in any other way.

As to Package Differentials: Sugar is sold at a "Basis Price", to which are added differential charges for certain grades of sugar and certain styles of packages. In Schedule 1-a the package differentials for these containers on which processing tax was paid, are shown for the period October 24, 1933, to February 5, 1936. During this period all of the articles upon which processing tax refund is now claimed were used in manufacture. This Schedule 1-a demonstrates that no increases were employed during this entire period as a means of passing to the purchasers of the sugar products the tax burden of processing tax paid on jute fabric.

As to Passing on the Tax by Increasing the Basis Price of Sugar: The amount of the processing tax on jute fabric, in terms of cost per 100 pounds of sugar output, was as follows:

Articles	Weight Per Unit (Pounds)	Rate of Tax (Dollars)	Amount of Tax Per Unit (Dollars)	Amount of Tax per 100 lbs. Sugar (Dollars)
Period 12/1/33 to 6/12/34:				
Jute Bags—100# Size	.81250	.02914	.023676	.023676
Jute Bags— 50# Size	.468561	.02914	.013654	.027308
Jute Bags— 25# Size	.28012	.02914	.008163	.032652
Period 6/12/34 to 11/30/36:				
Jute Bags— 50# Size	.46856	.0211	.0098866	.0197732
Jute Bags— 25# Size	.28012	.0211	.0059105	.0236420

These small unit costs on certain items did not warrant, even if competitive factors had permitted, an advance in the price of sugar, as the basis price for sugar is customarily changed by 10 cents or more per hundred weight. The basis price for sugar, furthermore, is established competitively and applies to all sugar products.

Claimant, therefore, maintains that the processing tax on jute fabric covered by this claim represented a cost which it bore the full burden of and which it did not pass on to other persons directly or indirectly. [21]

	10 6/3/34	11 & 12 6/25/34	13 10/2/34	14 11/3/34	15&16&17 11/26/34
SMALL					
25# Ba					
	.15	.15	.15	.15	.15
25# Bag	.20	.20	.15	.15	.15
	.15	.15	.15	.15	.15
50# Bag	.15	.15	.15	.15	.15
	.15	.15	.15	.15	.15
LARGE					
100# Ba					
	None	None	None	None	None
	"	"	"	"	"

	8 & 9 /29/35	10 7/20/35	11 9/20/35	12 9/24/35	1 2/3/36
SMALL J					
25# Bags					
	.15	.15	.15	.15	.15
25# Bags	.15	.15	.15	.15	.15
	.15	.15	.15	.15	.15
50# Bags	.15	.15	.15	.15	.15
	.15	.15	.15	.15	.15
LARGE J					
100# Bags					
	None	None	None	None	None
	"	"	"	"	"

- SCHEDULE 1-a -

PACKAGE PRICE DIFFERENTIALS FOR BAGS MADE FROM JUTE FABRIC

October 24, 1933 to February 5, 1936

		Price Card Number.	13	14 & 15	16	17 & 18	1 & 2	3 & 4	5&6&7	8 & 9	10	11 & 12	13	14	15&16&17
		Effective Date....	10/24/33	11/9/33	12/18/33	12/19/33	3/6/34	4/18/34	5/9/34	5/24/34	6/8/34	6/25/34	10/8/34	11/8/34	11/26/34
SMALL JUTE BAGS															
80# Bags Powdered	Coast		.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
	East		.20	.20	.20	.20	.20	.20	.20	.20	.20	.20	.15	.15	.15
80# Bags Softs	Coast		.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
	East		.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
50# Bags	Coast		.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
	East		.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
LARGE JUTE BAGS															
100# Bags	Coast		None	None	None	None	None	None	None	None	None	None	None	None	None
	East		"	"	"	"	"	"	"	"	"	"	"	"	"

		Price Card Number.	18	1	2	3	4	5	6	7	8 & 9	10	11	12	1
		Effective Date....	12/2/34	1/2/35	1/7/35	2/7/35	2/16/35	3/26/35	3/29/35	4/19/35	4/29/35	7/20/35	9/20/35	9/24/35	2/5/36
SMALL JUTE BAGS															
80# Bags Powdered	Coast		.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
	East		.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
80# Bags Softs	Coast		.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
	East		.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
50# Bags	Coast		.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
	East		.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15	.15
LARGE JUTE BAGS															
100# Bags	Coast		None	None	None	None	None	None	None	None	None	None	None	None	None
	East		"	"	"	"	"	"	"	"	"	"	"	"	"

See explanatory notes attached.

Notes on Exceptions to Prevailing Differential Prices Shown on Schedule 1-a

50# Bags

Effective January 24, 1934, the 50# Berry differential was eliminated in Southern California and Arizona. The differential remained on all other 50# bags.

Effective May 15, 1934, 50# Berry differential was reduced in Portland territory from 15c to 10c over basis. On May 28, the entire Northwest was reduced from 15c over to 10c over basis.

Effective May 22, 1934, 50# Berry differential was reduced from basis to 10c below basis in Southern California and Arizona (One day only). This was withdrawn May 23, 1934.

Effective September 12, 1934, to meet competition, the 50# Berry differential was reduced in Southern California and Arizona from basis to 10c below basis. The reduction was withdrawn November 26, 1934.

Effective February 6, 1935, at certain points in our Denver territory a 20c allowance was made for 50# Berry.

Effective November 27, 1935, 50# Berry differential was made uniform on the Pacific Coast at 15c.

25# Bags Powdered

Effective September 12, 1934, 25# bags powdered differential was reduced in Southern California from 15c over basis to 5c over basis. This was withdrawn November 26, 1934.

Effective October 1, 1934, 25# bag powdered differential was reduced in our Eastern territories from 20c over basis to 15c over basis. This decrease was to meet competition.

Effective December 11, 1934, the 15c differential on 25# powdered in Arkansas, Illinois, Wisconsin, and upper peninsula of Michigan and Eastern non-guarantee territory was increased to 20c.

Effective December 21, 1934, 25# powdered differential in the Eastern Fringe was reduced from 20c to 15c.

Effective January 7, 1935, in Eastern Non-Guarantee territory 25# powdered differential was increased from 20c to 35c.

Effective June 10, 1935, 25# powdered differentials were reduced from 35c to 15c in the non-guarantee territory.

Effective June 14, 1935, in part of Wisconsin, the 25# powdered differential was reduced from 35c to 15c. [23]

EXHIBIT "B"

Treasury Department
Washington 25

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
And Refer to

IT:P:CA

DHS

May 19, 1945

California and Hawaiian Sugar
Refining Corporation, Ltd.,
215 Market Street,
San Francisco, California.

In re: Claim No. F-9161
Amount: $4,818.00

Gentlemen:

Reference is made to the above-numbered claim for refund of an amount paid as tax under the provisions of the Agricultural Adjustment Act on the processing of cotton.

Section 902 of the Revenue Act of 1936 provides that no refund shall be made or allowed of any amount paid as tax under the Agricultural Adjustment Act unless the claimant establishes to the satisfaction of the Commissioner that he bore the burden of such amount and has not been relieved there-

of, nor reimbursed therefor, nor shifted such burden directly or indirectly, as set forth in that section.

An examination of the evidence submitted in connection with and in support of your claim discloses that you have not established that you bore the burden of the tax, refund of which is claimed. Accordingly, your claim is hereby disallowed in the full amount.

The disallowance of your claim will become final unless within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you file a petition with The Tax Court of the United States for a hearing on the merits of the claim.

A copy of this letter has been mailed to your representatives, Messrs. Henry J. Richardson and John Lewis Kelly, Washington, D.C., and Mr. Walter C. Fox, Jr., San Francisco, California, in accordance with the authority contained in powers of attorney on file in this office.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner.

By /s/ NORMAN D. CANN,
Deputy Commissioner. [24]

The Tax Court of the United States

Docket No. 453 P.T.

CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

MOTION TO DISMISS

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and moves that the above-entitled proceeding be dismissed, and, as grounds for this motion, respectfully shows as follows:

(1) The petition, together with the exhibits attached thereto and made a part thereof, fails to set forth facts sufficient to constitute a cause of action for refund of any part of any amount paid by the petitioner as processing tax under the Agricultural Adjustment Act, as amended, on the first domestic processing of jute.

(2) The petition, together with the exhibits attached thereto and made a part thereof, shows on its face that the petitioner did not bear the burden of any part of the amount paid by it as processing tax under the Agricultural Adjustment Act, as amended, on the first domestic processing of jute.

(3) The petition, together with the exhibits attached thereto and made a part thereof, fails to

allege or show that the financial benefits or considerations realized by the petitioner under its contracts with its "member-stockholders" were in anywise adversely affected or decreased because of the payment by the petitioner of certain amounts as processing tax.

Wherefore, it is prayed that this motion be granted. It is further prayed that if this motion be not granted, the respondent be allowed the usual time after the entry of the decision on this motion within which to move further or answer the allegations contained in the petition.

/s/ J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Of Counsel:

RAYMOND F. BROWN,
IRENE F. SCOTT,
LLOYD C. HOOKS,
Special Attorneys, Bureau of Internal Revenue.

Received and filed Nov. 7, 1945. [26]

The Tax Court of the United States

Docket Nos. 452 and 453, P.T.

THE CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

H. J. Richardson, Esq., and Walter C. Fox, Jr., for the petitioner.

Lloyd C. Hooks, Esq., for the respondent.

MEMORANDUM OPINION

Harlan, Judge: Respondent filed identical motions to dismiss these proceedings because the respective petitions and their attached exhibits:

(1) Failed to set forth a cause of action for refund of any part of the processing tax;

(2) Show that the petitioner bore none of the burden of the tax; and

(3) Failed to show that the petitioner's contractual rights or benefits with its stockholder-members were adversely affected by the payment of the tax.

The motions in these two cases were consolidated for hearing and decision. There is no difference in the legal principles involved in the two cases. The factual difference is that in Docket No. 452 the

processing tax was imposed on raw sugar, [27] almost all of which was procured by petitioner from its own stockholder-producers and in Docket No. 453 the processing tax was imposed upon the petitioner for manufacturing jute sacks out of jute cloth, the sacks being used as containers for sugar and the jute cloth being purchased on the open market. In both cases the actual processing tax on the books of petitioner was paid and the amount paid thereon recovered by petitioner in exactly the same way from its stock-holder-producers.

The essential facts disclosed by the petitions and their exhibits upon which respondent relies to support his motions are:

The petitioner is a private business corporation, incorporated under the laws of California, and is engaged in the refining of raw sugar and the marketing of refined and raw sugar.

The equitable title to its capital stock is in thirty separate corporate producer plantations located in Hawaii, the legal title thereto being in six trustees. These same producer plantations are also represented by six corporate factors or agents with offices in San Francisco and Hawaii. The method of business operation between petitioner and the producer plantations during the periods involved are set forth in detail in the contracts attached to the petitions as exhibits. In these contracts the petitioner refers to itself as the "buyer" and the factors representing the plantation producers are referred to as "sellers". This contract provides for the pur-

chase by the petitioner of practically all the raw sugar produced by the plantations. Petitioner agreed to pay for said raw sugar 75 per cent of the market value thereof, depending upon its quality shortly after its delivery in California. Thereafter petitioner, out of its general operating funds, paid the entire expense of marketing said raw sugar or of [28] processing and marketing same, depending upon conditions. Petitioner also paid all taxes, governmental charges, insurance premiums, attorney fees, trustees' fees, etc., and at the end of each fiscal year on November 30th petitioner accounts to the producers for the amount received by it from the sale of sugar and from "all other income", less the charges above mentioned and also less an amount as compensation to the buyer for its services. The provision covering this compensation reads as follows:

> * * * as full compensation for the Buyer's services under this agreement, a sum equal to 6% on the capital net worth of the Buyer as shown on its books as of the preceding November 30th.

The final payment from the petitioner to its producer-plantations is to be made on or before December 15th of each year. The amount retained by petitioner as compensation for its services, over and above its expenses, constitutes the fund from which dividends are paid on the capital stock of petitioner. However, there is no limitation set forth in the petitions or the exhibits requiring the corporation to distribute any part of this "compensation" to its stockholders.

There is no contention by the petitioner that the contracts attached to the petitions represent any unusual method of operations applied only during the processing tax years; also there is no averment that during the taxing years the amount retained by petitioner was either more or less than the six per cent provided in the contract.

Petitioner argues that the relationship between this corporation and its co-operative producers is similar to the relationship between a partnership and its partners, between a trustee and his beneficiaries or a corporation and its stockholders. It contends that the passing of the burden of the processing tax back to the co-operative producer in this case is identical to the transferring [29] of such a burden from a partnership to its members, from a trustee to his beneficiaries or from a corporation to its stockholders, and that if petitioner is not permitted to recover in this case, logically no one but an individual processor should ever recover.

Unfortunately for petitioner's position section 902 of the Revenue Act of 1936 as amended does not, by its terms, prohibit a corporation, trustee, or partnership processor from recovering processing taxes because the tax was indirectly paid by the stockholders, beneficiaries or partners, respectively. It does, however, specifically interdict the repayment of the processing tax to processors who have shifted the processing tax burden "through reduction of the price paid for any such commodity." There is no contention in this case but that peti-

tioner, before it paid for its raw sugar supplies to the producers thereof, deducted the amount of the processing tax from the price which it paid therefor.

Petitioner has both stockholders and co-operative producers. The fact that the equitable owners of the stock and the producers are the same corporate individuals does not obliterate the important fact that these corporate individuals as producers occupy a different relationship a petitioner than that occupied in their capacity as stockholders. The processing taxes involved have been shifted by petitioner to its stockholder-producers in their capacity as producers and not in their capacity as stockholders. The burden was assumed by the producers, not in proportion to their stockholdings, nor even in proportion to the respective amounts of the taxable commodity furnished (in the case of raw sugar), or used (in the case of jute bags); but in proportion to the raw sugar sold by the producer to the petitioner regardless of what amount of that raw sugar was ever actually processed or actually sold in bags or in bulk. [30]

Petitioner contends that since the producer and processor are so closely associated in a co-operative corporation:

> We think that Sec. 902 (a) requires a consolidation of a processor with its owners and persons owned by it as an economic unit for purposes of determining whether any part of the unit as a whole shifted any tax to a vendee

> or reduced the price paid for the commodity by any tax or shifted the tax in any other manner.

Congress has never been remiss about casting its favors on co-operatives and we feel that if it had really desired to confer this additional privilege on them, while prohibiting the shifting of the processing tax from processors to producers, in all other forms of industrial units, it would have plainly said so. For this Court to so declare would constitute, in our opinion, judicial legislation.

If the petitioner had paid its processing tax by reducing its dividends on its capital stock, or by some other method by which the producer-stockholders had borne the burden as stockholders and not as producers, it might be that petitioner could justify its claim, but the case before us is not such a case. Petitioner's decision to distribute the burden of these processing taxes back to its producers, in our opinion, precludes it from recovering its processing taxes just as certainly as did the same method in the case of Savannah Sugar Refining Corporation vs. Commissioner, 121 Fed. (2d) 426, where the court said:

> In construing the Act it has been repeatedly held that suits for the recovery of processing taxes may be maintained against the Government only under such conditions and with such limitations as Congress has prescribed. Therefore, only the person who has actually paid the tax may file a claim for refund and he can not recover if he has been reimbursed in any way

and had not borne the burden of the tax. No right of recovery is given a person not initially paying the tax although he may have borne the burden. Manifestly, it would be impracticable to do so as a person paying the tax may have passed it on to hundreds of others and so many claims might be filed they could not be handled.

The motion to dismiss these proceedings will be sustained.

Entered July 31, 1946.

[Seal] [31]

The Tax Court of the United States

Docket No. 453 P.T.

THE CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER AND DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion, entered July 31, 1946, it is

Ordered: That this proceeding is dismissed.

It Is Further Ordered: That there is no refund due the petitioner with respect to his claim for re-

fund of processing taxes in the amount of $4,818.00.

[Seal] /s/ BYRON B. HARLAN,
Judge.

Entered August 6, 1946. [32]

The Tax Court of the United States

Docket Nos. 452, 453 P.T.

CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To the Honorable The Presiding Judge of

The Tax Court of the United States:

MOTION FOR REVIEW BY THE COURT

Comes now the petitioner above named, by its attorney, Henry J. Richardson, and moves the Presiding Judge to direct a review by the whole Court of the Division decision sustaining respondent's motions to dismiss the above-entitled and docketed cases, contained in the memorandum opinion entered on July 31, 1946, as provided in Section 1118 (b) of the Internal Revenue Code or in Section 906 (e) of the Revenue Act of 1936, and, if said review is directed, that the orders entered in said cases on August 6, 1946, be vacated pending decision by the whole Court.

As grounds in support of this motion petitioner submits that: [34]

A. The cases involve very important questions of law in statutory interpretation which have never before been directly decided by this or any other court.

B. These cases involve very substantial amounts, in fact, based upon the facts alleged in the petitions which are taken as admitted for purposes of these motions, the amount involved exceeds $2,650,000.

C. The Memorandum Opinion of the Division demonstrates a complete lack of understanding of the significance of the facts of the cases and positive errors in interpreting the applicable terms of the statute in that—

(1) It fails wholly to take into account the law governing the operation of Cooperatives organized under the laws of the State of California;

(2) It fails to recognize the difference in the "price paid" in every day commercial transactions, which is the sense in which that term is used in Section 902 (a), and the "total payment" for the product under the cooperative method of operation, which is the vehicle for distributing the profits or proceeds from the cooperative operation under the contract in these cases.

(3) It fails to recognize the difference between "reduction of the price paid" for the

commodity processed on which the tax was imposed and paid, and the indirect reduction of distributable profits as a part of the "total payment" due all members on all the products furnished by them—more than 50 per cent of which was not subject to the tax at all.

(4) The memorandum opinion while basing its conclusion on the improper inference that the tax was shifted "through reduction of the price paid for such commodity" is totally and undeniably in error in applying the same reasoning to the Jute case, Docket No. 453, where the jute fabric, with respect to the processing of which the tax was imposed, was not acquired from petitioner's members but in the open market. Certainly [35] no "price paid" was reduced by any tax in such an acquisition.

(5) The memorandum opinion contains such expressions as to the facts of the cases as to show a conception thereof contrary to the facts alleged in the petitions and the evidence which would be admissible in proof thereof.

(6) The memorandum opinion fails to consider at all the provisions of Section 907 of the Revenue Act of 1936 which was enacted by Congress as a means of meeting the requirements of Section 902 thereof.

D. The existing confusion with respect to what decisions of this Court may be reviewed on appeal

to the Circuit Court of Appeals places a great responsibility on this Court.

These grounds will be discussed in the memorandum attached hereto.

Wherefore, it is prayed that this motion may be granted and respondent's motions to dismiss denied.

Respectfully submitted,

/s/ HENRY J. RICHARDSON,
Transportation Bldg.,
Washington 6, D.C.

/s/ WALTER C. FOX, JR.,
111 Sutter Street,
San Francisco, California,

Attorneys for Petitioner.

Filed Aug. 22, 1946.

Denied Aug. 23, 1946. T.C.U.S.

/s/ J. E. MURDOCK,
Presiding Judge. [36]

[Title of Tax Court and Cause.]

MOTION FOR RECONSIDERATION

Comes now the petitioner above named, by its attorney Henry J. Richardson, and moves the Court for a reconsideration of the opinion sustaining respondent's motions to dismiss the above-entitled and docketed cases entered on July 31, 1946.

As grounds to support this motion petitioner states that the entire basis of the opinion is erroneous, in that

1. It misconstrues the statutory term "price paid" to mean petitioner's "total payment" for all the commodity produced by all of its members, whereas the statutory clause "price paid for such commodity" clearly means the "price paid" for the commodity on which the tax was imposed;

2. It totally misconceives the significance of the fact that the tax paid by petitioner was equally spread over or entered into the determination of the amount of its "total payment" based on all the products of its members, only about 47 per cent of which was subject to the tax, and that in no [37] event was the "price paid" for jute (Docket No. 453) reduced in any manner whatsoever.

3. It misapplies the only authority cited, namely, Savannah Sugar Refining Corp. v. Commissioner, 121 Fed. (2d) 426, by considering that the "same method" was employed by petitioner as in that case, whereas in that case Savannah charged the entire tax to the specific sugar on the processing of which the tax was paid, under a specific contract made for that purpose, and in the case at bar the tax was not and could not be so charged, but on the contrary under both the contract of cooperation and the California Agricultural Code the tax, like any other expense, had to be spread equally, based on the total product of petitioner's members. Furthermore, Savannah Sugar Refining Corporation in P.T.

Docket No. 299, recovered a substantial refund of other processing taxes paid on sugar which did not reduce the "price paid" for the commodity (sugar) on which the tax was imposed. If petitioner had charged the total tax against the product of its members which was processed and on which the tax was paid, the Savannah case might be applicable, but this was not and could not be done. And at most only 47 per cent of the tax could be said to be charged so as to reduce the "price paid" for the commodity on which the tax was imposed. On the other hand, the other Savannah case (P.T. Docket No. 299) is authority for refunding that part of the tax which was not so charged even if the processor did charge some of the tax against a part of the product. [38]

4. It fails totally to take into account the law of cooperative associations under the California Agricultural Code in refusing to recognize the parallel between the legal capacity of a member producer thereof and persons entitled to the profits or proceeds of operations of other legal types of processors;

5. It ignores entirely the provisions of Sec. 907 of Title VII, Revenue Act of 1936, which were enacted to augment the provisions of Sec. 902 and make possible the determination of the exact question in this case, and concerning which this Court in a memorandum opinion in Realty Operators, Inc. v. Commissioner, Docket No. 423, P.T., said:

"Section 907 deals with prima facie evidence and presumptions which shall be available in determining the questions of ultimate fact posed by Section 902."

To save repetition there is attached hereto a copy of the printed memorandum brief submitted in support of petitioner's motion for review, in which substantially the aforesaid grounds are discussed.

Wherefore, it is prayed that this motion may be granted, and respondent's motions to dismiss the petitions herein denied.

Respectfully submitted,

/s/ HENRY J. RICHARDSON,

Attorney for Petitioner.

Filed Aug. 27, 1946.

Denied Aug. 28, 1946, U.S.T.C.

/s/ BYRON B. HARLAN,
Judge. [39]

In the United States Circuit Court of Appeals
for the Ninth Circuit

In The Tax Court of the United States
No. 453 P.T.

CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION, LTD.,
Petitioner,

vs.

JOSEPH D. NUNAN, JR.,
Commissioner of Internal Revenue,
Respondent.

PETITION FOR REVIEW AND STATEMENT OF POINTS TO BE RELIED UPON

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now California and Hawaiian Sugar Refining Corporation, Ltd., the above-named petitioner, by its attorney Henry J. Richardson, and respectfully shows:

I.

Venue:

California and Hawaiian Sugar Refining Corporation, Ltd., the petitioner on review (herein referred to as petitioner) is a corporation organized and existing under and by virtue of the laws of the State of California with its principal office and place of business at 215 Market Street, San Francisco, California; and Joseph D. Nunan, Jr., the respondent on review (herein referred to as respondent) is the duly qualified and acting Commis-

sioner of [40] Internal Revenue, appointed and holding office by virtue of the laws of the United States;

Petitioner filed its returns of the tax with respect to which this proceeding arises and made all payments thereof to the United States Collector of Internal Revenue at San Francisco, California, which place is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit;

The Court in which the review of the proceeding is sought is the United States Circuit Court of Appeals for the Ninth Circuit, which Court has jurisdiction to review the decision of The Tax Court of the United States in the instant proceeding by virtue of Section 510(j) of the Revenue Act of 1942 (56 Stat. 969), amending Section 906(g) of the Revenue Act of 1936 (49 Stat. 1750);

The final decision of The Tax Court of the United States dismissing this proceeding was entered on August 6, 1946.

II.

Nature of Controversy:

This is a proceeding under Title VII of the Revenue Act of 1936 (49 Stat. 1648, 1747) to recover $4,818.00 paid by petitioner as the processing tax on jute under the Agricultural Adjustment Act of 1933, the taxing provisions of which were declared unconstitutional in U. S. v. Butler (297 U. S. 1).

Title VII requires in Section 902 that a claimant in order to obtain a refund must establish that he bore the burden of the amount claimed. [41]

Both in its claim, which the respondent denied in its entirety, and in its petition to The Tax Court requesting a hearing on the merits of its claim, petitioner alleged that it had borne the burden of the amount claimed, as required by Section 902, and showed by other allegations the complete details of the manner in which said burden was borne and the amount thereof.

The petition contains detailed allegations to the effect that throughout the period here involved petitioner operated as a non-profit cooperative marketing association under the laws of the State of California, returning to its members (all sugar producers) annually the entire net proceeds from its operations on the basis of the product supplied by them.

Respondent did not file an answer to the petition but instead filed a motion to dismiss the proceeding, which of course admits the allegations of the petition.

Upon this motion The Tax Court on August 6, 1946, entered its decision dismissing the proceeding based on a memorandum opinion by Harlan, Judge, sustaining the motion.

The memorandum opinion covered not only this case but also the sugar processing tax case of this petitioner, said cases being consolidated before The Tax Court.

The memorandum opinion as applied to this case serves to point out the real basis and fundamental

error of the decision of The Tax Court in holding that a processor which operated as a non-profit cooperative marketing association is barred from making any recovery of a refund under Title VII.

The Tax Court's attempt at rationalization of its conclusion by saying that petitioner shifted the processing tax burden "through reduction of the price paid for any such commodity" is in spite of and directly contrary to the facts of this case, because petitioner acquired the jute in the open market from persons unknown to it, and not from its members who were entitled to share the proceeds of petitioner's operations on the basis of the products supplied by them.

III.

Petitioner, being aggrieved by the decision of The Tax Court of the United States and the conclusions of law and fact contained in the opinion on which said decision is based, hereby petitions the United States Circuit Court of Appeals for the Ninth Circuit to review said decision, and files herewith the following statement of the points upon which it intendes to rely:

1. The decision of The Tax Court is not in accordance with law;

2. The point of fact upon which the memorandum opinion purportedly rests, namely, that petitioner "shifted the processing tax burden through reduction of the price paid for any such commodity" is wholly absent from the case, the jute cloth having been acquired in the open market and not from petitioner's members as was the sugar;

3. The processing tax which petitioner paid on manufacturing jute cloth into bags, like any other expense of operation, operated to reduce the net proceeds from such operations; [43]

4. Petitioner's members as producers, sharing as they do the net proceeds of petitioner's entire operations, including profits, based on the proportion of the product supplied by each, occupy a position with respect to profits from petitioner's operations which are reduced by any and all burdens borne by petitioner, similar to that of a common stockholders of an ordinary corporation, a general partner of a partnership, and the income beneficiary of a trust, with respect to the profits of their respective types of organization, the profits of all of which are obviously reduced by any burdens borne by such organizations;

5. Congress did not intend by Title VII to prohibit recovery in such cases, but was concerned lest the processor or the persons entitled to its profits would be unjustly enriched by the windfall of recovering any tax which the processor or such persons had shifted to others;

6. Neither petitioner nor its members as producers will be unjustly enriched if a refund based on the prima facie evidence and permissible rebuttal is made in this case, but will only be placed in a position of equality with other processors and the persons entitled to the profits from their operation;

7. While holding that these other types of business organizations may recover a refund under Title

VII, as many of them have, The Tax Court refused to recognize the parallel between them and petitioner, and by misconstruction of the terms of the statute jumped to the erroneous conclusion that petitioner shifted the [44] burden of the tax "through reduction of the price paid for such commodity" contrary to the facts alleged in the petition.

Wherefore, petitioner prays that the decision of The Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that The Tax Court of the United States be required to certify and file in this Court a transcript of the record in accordance with the law and with the rules of this Court, and that appropriate action be taken to the end that the erroneous decision hereby complained of may be reviewed and corrected by this Court.

CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION, LTD.,

By /s/ HENRY J. RICHARDSON,

Its Attorney.

Filed Oct. 23, 1946. [45]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To Joseph D. Nunan, Jr., Commissioner of Internal Revenue, Washington, D. C.
Care of J. P. Wenchel, Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent,
Washington, D. C.

You are hereby notified that on the 23rd day of October, 1946, California and Hawaiian Sugar Refining Corporation, Ltd., filed with the Clerk of The Tax Court of the United States a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review and statement of the points relied upon as filed is hereto attached and served upon you this 23rd day of October, 1946.

/s/ HENRY J. RICHARDSON,
Attorney for Petitioner.

Service of the above and foregoing notice, together with a copy of the petition for review and statement of points relied upon is hereby acknowledged this 23rd day of October, 1946.

/s/ J. P. WENCHEL, R. F. B.,
Attorney for Respondent.

Filed Oct. 23, 1946. [46]

[Title of Circuit Court of Appeals and Cause.]

PRAECIPE

To the Clerk of The Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the United States Circuit Court of Appeals for the Ninth Circuit heretofore filed by petitioner:

1. The docket entries in the proceeding before The Tax Court of the United States;

2. Pleadings:

(a) The petition, together with all exhibits, Exhibit A being a photostatic copy of the claim for refund with accompanying schedules and amendments thereto, and Exhibit B being a photostatic copy of the notice of disallowance of said claim by the Commissioner of Internal Revenue; [47]

(b) The respondent's motion to dismiss the proceeding;

3. Memorandum Opinion of The Tax Court of the United States entered on July 31, 1946;

4. Decision of The Tax Court of the United States entered on August 6, 1946;

5. Petitioner's motion for review by the Court filed on August 22, 1946;

6. Petitioner's motion for reconsideration filed August 27, 1946;

7. Petition for review and statement of points relied on filed October 23, 1946, by petitioner in the above-entitled cause together with notice and proof of service thereof;

8. This Praecipe.

/s/ HENRY J. RICHARDSON,
Attorney for Petitioner.

Service of a copy of the above and foregoing Praecipe to the Clerk of The Tax Court of the United States on petition for review in the above-entitled cause is hereby acknowledged this 23rd day of October, 1946.

/s/ J. P. WENCHEL, R. F. B.,
Attorney for Respondent.

Filed Oct. 23, 1946. [48]

The Tax Court of the United States

Docket No. 453 P.T.

CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the fore-

going pages, 1 to 48, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 19th day of November, 1946.

[Seal] /s/ VICTOR S. MERSCH,
Clerk.

[Endorsed]: No. 11489. United States Circuit Court of Appeals for the Ninth Circuit. California and Hawaiian Sugar Refining Corporation, a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon petition to review a decision of The Tax Court of the United States.

Filed November 25, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.